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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 In re No. 06-40163 TK
12 MARIA ESTHER QUINTERO, Chapter 7
13 Debtor.
14 _____/

15 **MEMORANDUM OF DECISION**

16 This Memorandum addresses the consequences of a secured
17 creditor's failure to provide a chapter 7 debtor in a case subject to
18 the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA")
19 with the disclosures required by 11 U.S.C. § 524(k). For the reasons
20 stated below, the Court denies the above-captioned debtor's request
21 that it approve her reaffirmation agreement with National Auto
22 Finance ("National"). The Court also holds that National may not
23 repossess its collateral as a result of the Court's failure to
24 approve the reaffirmation agreement. The reasons for the Court's
25 decision are set forth below.

26 **DISCUSSION**

The debtor (the "Debtor") filed a bankruptcy petition on
February 13, 2006. As a result, her case is governed by the

1 amendments to the Bankruptcy Code enacted by BAPCPA. On or about
2 April 4, 2006, the Debtor submitted a reaffirmation agreement (the
3 "Agreement") to the Court for its approval. The Agreement was signed
4 by the Debtor on March 9, 2006 and by National on March 28, 2006.
5 The Agreement represented that the debt was secured by a 2003
6 Mitsubishi Lancer (the "Car"). It did not list a value for the Car.
7 However, in her bankruptcy schedules, the Debtor valued the Car at
8 approximately \$8,000. The Agreement listed the debt to be reaffirmed
9 as \$11,824.70.

10 Under the Bankruptcy Code prior to BAPCPA, assuming the Debtor
11 was current on her payments, the Court would not have approved the
12 Agreement. In In re Parker, 139 F.3d 668 (9th Cir. 1998), the Ninth
13 Circuit Court of Appeals held that a bankruptcy court did not err by
14 refusing to approve a debtor's agreement to reaffirm a debt secured
15 by her car. It agreed with the bankruptcy court that it was not in
16 the debtor's best interest to reaffirm the debt because, as long as
17 the debtor maintained payments on the car, the car could not be
18 repossessed. Reaffirming the debt would provide no advantage to the
19 debtor, only the disadvantage that the debtor would be liable for any
20 deficiency if the car were repossessed and sold at a foreclosure sale
21 for less than the debt. See id. at 671-73. This holding has been
22 referred to as the "pay and drive" option. As noted by the Parker
23 court, the Second, Fourth, and Tenth Circuits had previously
24 concluded that a chapter 7 debtor could "pay and drive." The Fifth,
25 Seventh, and Eleventh Circuits had reached a contrary conclusion.
26 Id. at 672 (citing cases).

1 BAPCPA endeavored to eliminate the "pay and drive" option.
2 Thus, as amended by BAPCPA, section 521(a) provides, in pertinent
3 part, that:

4 (a) **the debtor shall--**

5 ...

6 (2) if an individual debtor's schedule of assets
and liabilities includes debts which are secured
by property of the estate--

7 (A) within thirty days after the filing of
a petition under chapter 7 of this title or on
8 or before the date of the meeting of creditors,
whichever is earlier, or within such additional
9 time as the court, for cause, within such period
fixes, the debtor shall file with the clerk a
statement of his intention with respect to the
10 retention or surrender of such property and, if
applicable, specifying that...the debtor intends
11 to reaffirm debts secured by such property;

12 (B) within 30 days after the first date set
for the meeting of creditors under section
13 341(a), or within such additional time as the
court, for cause, within such 30-day period
14 fixes, the debtor shall perform his intention
with respect to such property, as specified by
15 subparagraph (A) of this paragraph;....

16 ...

17 (6) in a case under chapter 7 of this title in
which the debtor is an individual, **not retain**
18 **possession of personal property as to which a**
creditor has an allowed claim for the purchase
19 **price secured in whole or in part by an interest**
in such personal property unless the debtor, not
later than 45 days after the first meeting of
creditors under section 341(a)...

20 (A) **enters into an agreement with the**
creditor pursuant to section 524(c) with respect
21 **to the claim secured by such property;...**

22 If the debtor fails to so act within the 45-day
period referred to in paragraph (6), the stay
under section 362(a) is terminated with respect
23 to the personal property of the estate or of the
debtor which is affected, such property shall no
24 longer be property of the estate, and the
creditor may take whatever action as to such
25 property as is permitted by applicable
nonbankruptcy law....[Emphasis added.]

26 See 11 U.S.C. § 521(a).

1 As amended by BAPCPA, section 362(h)(1) provides, in pertinent
2 part:

3 (h)(1) In a case in which the debtor is an
4 individual, the stay provided by subsection (a)
5 is terminated with respect to personal property
6 of the estate or of the debtor securing in whole
7 or in part a claim...and such personal property
8 shall no longer be property of the estate if the
9 debtor fails within the applicable time set by
10 section 521(a)(2)-

11 (A) to file timely any statement of
12 intention required under section 521(a)(2) with
13 respect to such personal property or to indicate
14 in such statement that the debtor will
15 [retain]...such personal property...[and] enter
16 into an agreement of the kind specified in
17 section 524(c) applicable to the debt secured by
18 such personal property...; and

19 (B) to take timely the action specified
20 in such statement, as it may be amended before
21 expiration of the period for taking action,
22 unless such statement specifies the debtor's
23 intention to reaffirm such debt on the original
24 contract terms and the creditor refuses to agree
25 to the reaffirmation on such terms.

26 See 11 U.S.C. § 362(h)(1).

 Section 524(k) is a new section, which was added by BAPCPA. It
specifies a series of disclosure that must be provided to the debtor
concerning the debt to be affirmed and the reaffirmation process.
It also includes a form of motion, declaration, and proposed form of
order. As the Court reads section 524(k), all of these items are to
be provided to the debtor by the secured creditor at or before the
reaffirmation agreement is signed by the debtor. As amended by
BAPCPA, section 524(c) provides, in pertinent part:

 (c) An agreement between a holder of a claim and
the debtor, the consideration for which, in
whole or in part, is based on a debt that is
dischargeable in a case under this title is
enforceable only...if -

1
2 ... (2) the debtor received the disclosures
3 described in subsection (k) at or before the
4 time at which the debtor signed the
5 agreement;....

6 See 11 U.S.C. § 524(c).

7 Given the elimination of the "pay and drive" option, the Court
8 would be prepared to approve the Agreement if the Agreement were
9 enforceable. It appears that the Debtor can afford to make the
10 monthly payments and apparently needs the Car for transportation to
11 work. However, as the Court reads section 524(c)(2), the Agreement
12 is unenforceable. The Agreement does not contain the required
13 disclosures nor does it contain a motion, declaration, or proposed
14 form of order. The Court inquired of the Debtor at the hearing on
15 approval of the Agreement whether National had given her any other
16 disclosure documents. She said that National had not done so.¹

17 Moreover, this problem cannot be solved by National providing
18 the disclosures now together with a new reaffirmation agreement. The
19 deadlines for the Debtor to act have already passed. The Debtor
20 complied with those deadlines with respect to the Agreement but would
21 be unable to do so with respect to a new agreement. See 11 U.S.C.
22 § 521(a)(2).

23 The question then presented is whether National may repossess
24 the Car even if the Debtor is not in default on her payments based
25 on the Court's failure to approve the Agreement. The Bankruptcy Code

26 ¹National was given notice of this hearing but did not appear.
See 11 U.S.C. § 524(m) (1) (reaffirmation agreement may not be
denied approval without hearing on notice to debtor and creditor).

1 is ambiguous on this point. However, the only reasonable conclusion
2 is that National may not do so. BAPCPA includes in its title the
3 phrase "consumer protection." The addition of section 524(k) is
4 probably the primary protection provided to chapter 7 debtors by
5 BAPCPA. Congress cannot have intended to leave it within a secured
6 creditor's power to thwart a chapter 7 debtor's attempt to retain
7 her car and reaffirm her debt by failing to comply with the
8 requirement that the creditor supply the debtor with the expanded
9 disclosures at the appropriate time.

10 This conclusion is not inconsistent with the express language
11 of the statute. Section 521(a)(6) provides only that a debtor may
12 not retain the collateral unless the debtor enters into a
13 reaffirmation agreement. It does not require the reaffirmation
14 agreement to be approved. This conclusion is also consistent with
15 section 362(h)(1)(B) which provides that the automatic stay does not
16 terminate and the collateral remains property of the estate if the
17 debtor has offered to enter into an agreement to reaffirm the debt
18 on the same terms provided by the contract and the creditor has
19 refused. By failing to comply timely with section 524(k), National
20 has in effect refused to enter into an enforceable reaffirmation
21 agreement with the Debtor.

22 CONCLUSION

23 The Agreement is not approved. However, National is prohibited
24 from repossessing the Car based on the failure of the Court to
25 approve the Agreement.

26 END OF DOCUMENT

COURT SERVICE LIST

Steven L. Jacobs
Law Offices of Steven L. Jacobs
Sanwa Bldg. #350
14895 E 14th St.
San Leandro, CA 94578

Maria Esther Quintero
P.O. Box 265
Pleasanton, CA 94588

National Auto Finance
c/o Nuvell Financial Services Corp.
P.O. Box 7100
Little Rock, AR 72223-7100

John Kendall
2411 Santa Clara Avenue
Suite 12
Alameda, CA 94501